92-223

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GLOBE LIFE AND ACCIDENT INSURANCE COMPANY,

Petitioner,

v.

OKLAHOMA TAX COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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Date: July 31, 1992

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QUESTIONS PRESENTED FOR REVIEW

Were the property rights of the Petitioner denied under the due process clause of the Fourteenth Amendment to the United States Constitution when the Oklahoma Tax Commission (a) assessed sales and use taxes on purchases of the Petitioner and (b) denied Petitioner's claim for refund of said taxes, in order to follow an Opinion of the Oklahoma Attorney General as required by the Oklahoma Supreme Court?

PARTIES

In addition to the parties appearing in the caption of this case, the following corporations are related to the Petitioner, Globe Life and Accident Insurance Company, under Rule 29.1:

Name	Relationship
Torchmark Corporation	Parent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

OPINIONS DELIVERED IN THIS CASE AND ITS COMPANION CASE 1

JURISDICTION 2

STATUTES, CONSTITUTIONAL PROVISIONS AND OPINIONS OF THE OKLAHOMA ATTORNEY GENERAL 2

STATEMENT OF THE CASE 3

REASONS RELIED ON FOR ALLOWANCE OF WRIT 6

CONCLUSION 9

APPENDIX

A The Findings, Conclusions and Recommendations of the Administrative Law Judge for the Oklahoma Tax Commission filed December 29, 1989 denying the sales and use tax claim for refund of Petitioner is reprinted as Appendix A hereto A-1

B The Order of the Oklahoma Tax Commission dated February 9, 1990 denying the Petitioner's' Application for Oral Argument Before the Tax Commission En Banc and Adopting the Findings, Conclusions and Recommendations of the Administrative Law Judge is reprinted as Appendix B hereto A-13

TABLE OF CONTENTS – Continued

Page

C The Opinion of the Supreme Court of the State of Oklahoma filed December 3, 1991 in the companion case, Professional Investors Life, Insurance Company v. Oklahoma Tax Commission reported at 825 P.2d 1292 (Okl. 1991), is reprinted as Appendix C hereto A-15

D The Opinion of the Supreme Court of the State of Oklahoma filed May 12, 1992 affirming the Order of the Oklahoma Tax Commission denying Petitioner's claim for refund is reprinted as Appendix D hereto..... A-23

E Oklahoma Statutes Title 36, Section 624 reprinted as Appendix E hereto A-27

F Oklahoma Attorney General Opinion No. 88-34 reprinted as Appendix F hereto..... A-31

G Oklahoma Statutes Title 68, Section 1351 reprinted as Appendix G hereto..... A-39

H United States Constitution, Amendment 14, Section 1 reprinted as Appendix H hereto..... A-40

I Notice to Petitioner from Business Tax Division of the Oklahoma Tax Commission..... A-41

J Notice to Vendors of Petitioner..... A-43

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Insurance v. LaVoie, 475 U.S. 813 (1986) 6
Allen v. Retirement System for Justices, 769 P.2d 1302 (Okl. 1988) 5
Central of Georgia Railway Co. v. Wright, 28 S.Ct. 47 (1907) 4
Corstvet v. Boger, 757 F.2d 223 (10th Cir. 1985) 4
Dodds v. Ward, 418 P.2d 629 (Okl. 1966) 4
Federal Trade Commission v. Bunte Bros., 312 U.S. 349, 61 S.Ct. 580 (1941) 5
International Harvester Co. v. Missouri, 234 U.S. 199 (1914) 6
Lawrence v. State Tax Commission of Mississippi, 286 U.S. 276 (1932) 6
McKesson v. Division of Alcoholic Beverages and Tobacco, ___ U.S. ___, 110 S.Ct. 2238 (1990) 8
Mutual Life Insurance Company of New York v. City of Los Angeles, 787 P.2d 996 (Cal. 1990) 7
New York Life Insurance v. Town of Comanche, 162 P. 466 (Okl. 1916) 7
Professional Investors Life Insurance Co. v. Oklahoma Tax Commission, 825 P.2d 1292 (Okl. 1991) 6
Ward v. Board of County Commissioners, 253 U.S. 17 (1920) 6
Western Air Lines v. Board of Equalization, 480 U.S. 123 (1987) 7

Statutes

Oklahoma Statutes Title 36, Section 624 .....2, 3, 4, 7
Oklahoma Statutes Title 68, Section 1351 2

Other

74 Harv.L.Rev. 1375 (1961) 7

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OPINIONS DELIVERED IN THIS CASE AND ITS COMPANION CASE

The Findings, Conclusions and Recommendations of the Administrative Law Judge for the Oklahoma Tax Commission filed December 29, 1989 denying the sales and use tax claim for refund of Petitioner is reprinted as Appendix A hereto.

The Order of the Oklahoma Tax Commission dated February 9, 1990 denying the Petitioner's Application for Oral Argument Before the Tax Commission En Banc and adopting the Findings, Conclusions and Recommendations

of the Administrative Law Judge is reprinted as Appendix B hereto.

The Opinion of the Supreme Court of the State of Oklahoma filed December 3, 1991 in the companion case, Professional Investors Life Insurance Company v. Oklahoma Tax Commission reported at 825 P.2d 1292 (Okl. 1991), is reprinted as Appendix C hereto.

The Opinion of the Supreme Court of the State of Oklahoma filed May 12, 1992 affirming the Order of the Oklahoma Tax Commission denying Petitioner's claim for refund is reprinted as Appendix D hereto.

JURISDICTION

The decision of the Oklahoma Supreme Court of which the Petitioner seeks review was filed on May 12, 1992. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(a) to review the judgment in question by writ of certiorari.

STATUTES, CONSTITUTIONAL PROVISIONS AND OPINIONS OF THE OKLAHOMA ATTORNEY GENERAL

Oklahoma Statutes Title 36, Section 624 reprinted as Appendix E hereto.

Oklahoma Attorney General Opinion No. 88-34 reprinted as Appendix F hereto.

Oklahoma Statutes Title 68, Section 1351 reprinted as Appendix G hereto.

United States Constitution, Amendment 14, Section 1 reprinted as Appendix H hereto.

STATEMENT OF THE CASE

Petitioner is a stock insurance company engaged in underwriting life, accident and health insurance in Oklahoma. Petitioner did not pay sales tax in Oklahoma, nor did the Oklahoma Tax Commission assess sales tax on purchases made by petitioner in Oklahoma pursuant to the Oklahoma Sales Tax Code because of the "in lieu of" tax provisions of Oklahoma Statute 36 O.S. §624 (see Appendix E). Under that law, Petitioner paid an annual tax on gross premiums in lieu of all other taxes otherwise payable to the State of Oklahoma or any county or city therein except for certain taxes specifically excepted in said statute.

On August 26, 1988, the Oklahoma Attorney General issued his Opinion No. 88-34 (Appendix F) concluding that 36 O.S. §624 does not exempt an insurance company from the payment of sales tax in Oklahoma. In November of 1988, the Business Tax Division of the Oklahoma Tax Commission notified Petitioner that it does not have an exemption from the payment of state, city or county sales taxes according to Opinion 88-34 of the Oklahoma Attorney General effective as of the date of that Opinion (see Appendix I). A similar notice was sent by the Oklahoma Tax Commission to vendors of Petitioner and other insurance companies doing business in Oklahoma (see Appendix J).

Petitioner thenceforth paid Oklahoma sales tax and instituted a refund proceeding before the Oklahoma Tax Commission upon stipulated facts. The Administrative Law Judge concluded that the Petitioner was not exempted from sales tax by the "in lieu of" provisions of 36 O.S. §624, that the Oklahoma Tax Commission has a duty to follow the Opinion No. 88-34 of the Oklahoma Attorney General, and, accordingly, that the tax refund claim of Petitioner be denied (Appendix A).

In its subsequent Motion for Hearing En Banc before the Oklahoma Tax Commission, Petitioner raised the federal questions sought to be reviewed here. Paragraph 9 of that Motion states:

> 9. By following the Attorney General's Opinion No. 88-34, the Administrative Law Judge has denied the claimant procedural due process under the Oklahoma Constitution Article 2, Section 7, and the United States Constitution Amendment 14, §1. Opportunity for a fair hearing must be afforded a taxpayer to meet due process. *Central of Georgia Railway Co. v. Wright,* 28 S.Ct. 47 (1907). The Administrative Law Judge has not provided Globe a meaningful remedy. "Due process of law" means an orderly proceeding adopted to the nature of the case, before a tribunal having jurisdiction, which proceeds upon notice, with an opportunity to be heard, *with full power to grant relief.* (Emphasis added). *Dodds v. Ward,* 418 P.2d 629 (Okl. 1966). The fundamental right of due process is an opportunity to be heard at a meaningful time in a meaningful manner. *Corstvet v. Boger,* 757 F.2d 223 (10th Cir. 1985). The Administrative Law Judge has erroneously abdicated her powers to

> grant relief to the Oklahoma Attorney General. There is no question that the Oklahoma Tax Commission did not assess sales or use tax on the claimant prior to the issuance of Opinion No. 88-34. Since the Tax Commission did not collect sales tax from Globe before that Opinion was issued, the Commission must believe that the claimant is not subject to sales, or use, taxes. See *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 61 S.Ct. 580 (1941). The remedy now afforded by the Administrative Law Judge is a sham predetermined by the Attorney General. See *Allen v. Retirement System for Justices*, 769 P.2d 1302, 1308 (Okl. 1988).

The Oklahoma Tax Commission later denied Petitioner's Motion and adopted the Findings, Conclusions and Recommendations of the Administrative Law Judge (Appendix B). In doing so, the Oklahoma Tax Commission did not expressly address the federal questions raised by the Petitioner.

Petitioner next filed an appeal to the Oklahoma Supreme Court from the Order of the Oklahoma Tax Commission. Petitioner again renewed the federal questions previously raised, but the Oklahoma Supreme Court, in its Opinion filed May 12, 1992, like that of the Oklahoma Tax Commission, did not expressly address the federal questions raised by Petitioner and that Court affirmed the Order of the Oklahoma Tax Commission denying Petitioner's claim for refund of taxes (Appendix D).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Oklahoma Supreme Court has decided a federal question in a way that conflicts with the decisions of this Court.

The Oklahoma Supreme Court held that the Oklahoma Tax Commission has a duty to follow the Opinions of the Oklahoma Attorney General. The effect of this ruling necessarily subsumed the federal question due process claims of Petitioner even though that court did not expressly address them. *Aetna Life Insurance v. LaVoie,* 475 U.S. 813 (1986). Federal rights can be denied by the refusal of a state court to decide questions presented as well as by an erroneous decision of those questions. *Lawrence v. State Tax Commission of Mississippi,* 286 U.S. 276 (1932). Petitioner timely raised the federal questions before the Oklahoma Tax Commission issued its Order denying Petitioner's tax refund claim. Neither the Oklahoma Tax Commission nor the Oklahoma Supreme Court expressly addressed those questions. Nevertheless, this silence toward the federal questions raised should not be regarded as condemning the timeliness of the raising of those questions when the record shows that they were properly and timely raised. *International Harvester Co. v. Missouri,* 234 U.S. 199 (1914).

The Oklahoma Supreme Court's decision that the "in lieu of" tax on premiums paid by the Petitioner does not exempt it from sales tax rests on untenable non-federal grounds. *Ward v. Board of County Commissioners,* 253 U.S. 17 (1920). The reasoning of the Oklahoma Supreme Court is set forth in the companion case, *Professional Investors Life Insurance Co. v. Oklahoma Tax Commission,* 825 P.2d

1292 (Okl. 1991) (Appendix C). Contrary to that reasoning, the plain language of 36 O.S. §624 precludes the construction placed upon it by the Oklahoma Supreme Court. That statute says that payment of the premiums tax by an insurance company is in lieu of all other taxes, except those listed in the same provision. The Oklahoma Supreme Court has not consistently applied the "in lieu of" statute. The Oklahoma court has previously held that the "in lieu of" tax should be liberally construed and that "the state, county, and every municipality in the state are prohibited from imposing any other burden in the way of taxation upon said company". *New York Life Insurance v. Town of Comanche,* 162 P. 466, 467 (Okl. 1916).[1] Such conflicts are relevant to this Court's evaluation of the adequacy of non-federal grounds of decision. 74 Harv.L.Rev. 1375 (1961). This court has broadly construed an "in lieu of" tax provision and reasoned that it should not be limited to taxes existing at the date of enactment. *Western Air Lines v. Board of Equalization,* 480 U.S. 123 (1987). The exemption language in the Oklahoma Sales Tax Code itself is broad. (See Appendix G).

The Oklahoma Supreme Court's reliance upon state law grounds to dispose of the Petitioner's claim ignored the terminal effect of the Attorney General's Opinion. It is clear from the Recommended Decision of the Administrative Law Judge that the Oklahoma Tax Commission would not have assessed sales tax on the Petitioner but for the issuance of the Oklahoma Attorney General's Opinion No. 88-34. The right of Petitioner to due process was denied when that binding Opinion was issued. From that day forward, Petitioner lost its rights protected by

---

[1] Compare the recent decision of the Supreme Court of California in *Mutual Life Insurance Company of New York v. City of Los Angeles,* 787 P.2d 996 (Cal. 1990).

the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

This Court recently said in *McKesson v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, 110 S.Ct. 2238 (1990):

> "To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' O'Connor, 223 U.S., at 285, 32 S.Ct., at 216, for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one".

110 S.Ct. at 2251. That case, like the instant one, concerned a taxpayer's postdeprivation refund claim. In this case, the Oklahoma Tax Commission's judicially imposed duty to follow the Opinion of the Oklahoma Attorney General left the Petitioner remediless.

The due process denied Petitioner, therefore, pervades the initiating assessment as well as the subsequent proceedings. The state law grounds used by the Oklahoma Supreme Court cannot serve to avoid the federal questions raised by Petitioner, nor can those state law grounds provide an independent and adequate ground supporting resolution of Petitioner's claim.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

BEFORE THE ADMINISTRATIVE LAW JUDGE OF THE
OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA

IN THE MATTER OF THE CLAIM FOR REFUND OF SALES AND USE TAX BY GLOBE LIFE AND ACCIDENT INSURANCE COMPANY	)))))	CASE NO. CR-89-015

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

(Filed Dec. 29, 1989)

NOW on this 29th day of December, 1989, the above styled cause comes on for consideration by assignment regularly made by the Oklahoma Tax Commission to Melanie K. Parks, Administrative Law Judge. By agreement of the parties this case was submitted without a hearing. The Claimant is represented by Steven K. McKinney, Attorney at Law. The Sales and use Tax Section of the Business Tax Division of the Oklahoma Tax Commission is represented by Mark Alan Harter, Assistant General Counsel of the General Counsel's Office of the Oklahoma Tax Commission.

STIPULATION OF FACTS

The parties stipulated to the following facts:

1. Globe is a foreign corporation, authorized to do business in the State of Oklahoma, with its principal

place of business in Oklahoma. Globe underwrites life, accident and health insurance.

2. As part of its business, Globe sells insurance through agents. On the premiums generated from sales of insurance upon the lives of persons residing in Oklahoma, and upon other risks within Oklahoma, Globe pays an annual tax required by 36 O.S. § 624 (Oklahoma premiums tax).

3. Globe regularly pays the tax imposed on premiums by 36 O.S. § 624. In 1986, Globe paid $251,378 to Oklahoma in gross premiums tax. In 1987, Globe paid $237,176 in said tax. Globe has continued to pay Oklahoma premiums tax.

4. Globe makes purchases directly or through its agents of personal property and services within the State of Oklahoma.

5. On August 26, 1988, the Attorney General of the State of Oklahoma issued Opinion No. 88-34 ("Opinion").

6. Prior to the issuance of the Opinion, vendors selling goods and services to Globe did not collect sales taxes from Globe based upon Globe's purchase of personal property. Subsequent to the issuance of the Opinion, vendors are collecting sales taxes for sales to Globe of personal property within Oklahoma.

7. The Opinion concluded that the provisions of 36 O.S. § 624 do not exempt an insurance company from the payment of sales tax where such insurance company is acting as the purchaser of goods or services and a sales tax would otherwise be imposed.

8. Before the Attorney General issued the Opinion, the Commission did not require vendors to collect sales taxes on purchases by Globe of personal property because Globe was paying the Oklahoma premiums tax in lieu of such taxes.

9. After the Attorney General issued the Opinion, the Commission required vendors to collect sales taxes on purchases by Globe of personal property subject to sales tax.

10. In compliance with the Commission's enforcement of the Opinion, Globe has paid sales taxes since October, 1988.

11. Globe's claim for refund filed on August 16, 1989, for taxes paid in October, 1988, and thereafter, was timely and shall be deemed continuing for each month in which Globe pays sales and use taxes. The amounts of taxes paid by Globe will be substantiated by it from time to time during the pendency of this case.

12. Globe requested that in order to expedite the administrative process before the administrative law judge of the Oklahoma Tax Commission, that it not be required to file a claim for refund with the Business Tax Division ("Division") of the Commission, but that it be allowed to file its claim initially with the Office of the Administrative Law Judge. Globe was permitted to file its claim for refund without obtaining a denial of the claim by the Division because Globe was informed that it would be unnecessary to have its claim formally denied. The parties agree that Globe's claim satisfies the procedural requirements for a claim for refund pursuant to Rule 02.004.00 of the Rules of Practice and Procedure of

the Oklahoma Tax Commission and that the claim is being treated as if it had actually been denied by the Division.

13. These stipulations of fact may be supplemented by mutual agreement of counsel.

ISSUES

I. Whether the license fee and premiums tax paid by Protestant pursuant to the Oklahoma Insurance Code is in lieu of the sales taxes Protestant pays as a purchaser of goods and services?

II. Whether the Oklahoma Tax Commission, as an administrative agency, is bound by an opinion of the state Attorney General?

APPLICABLE LAW

I.

At issue in this protest is whether an insurance company, which pays an annual license fee and premiums tax in accordance with Section 624 of the Oklahoma Insurance Code, is relieved of paying sales taxes on its purchases because of the language contained in Section 624 that the license fee and tax shall be in lieu of all other state taxes or fees. 36 O.S. 1981, § 624. When enacted, Section 624 provided that foreign insurance companies doing business in Oklahoma would pay an annual tax of two percent (2%) on premiums collected, and an annual tax of $3.00 for each local agent, in lieu of all other taxes or fees. The Oklahoma Supreme Court in a 1932 decision construing Section 624 held that the "in lieu" provisions

did not exempt foreign insurance companies from paying ad valorem taxes to a county. *New York Life Insurance Co. v. Bd. of Comm'rs of Oklahoma County,* 155 Okla. 247, 9 P.2d 936 (Okl. 1932). The court reasoned that a tax on premiums was similar to a license, occupation, or privilege tax, not a property tax, and that the "in lieu" language meant to exempt only payment of taxes on like-kind activities because the law did not favor exemption from taxes.

The Section 624 "in lieu" provision has been amended several times. Following the *New York Life* case, the legislature amended Section 624 to except ad valorem taxes from the in lieu provisions. In 1986 the legislature excepted taxes assessed pursuant to Section 50001 of Title 68 (tax on fire insurance companies). In 1987, the law was amended to except taxes assessed under the insurance code. The most recent amendment was in 1988 when fees paid by health maintenance organizations pursuant to 63 O.S. Supp. 1988, § 2501 et seq. were excepted from the in lieu provision. Section 624, in pertinent part, now reads as follows:

> Every such company shall . . . pay to the Insurance Commissioner:
>
> (1) An annual license fee as prescribed by Section 321 of this Code, except for Health Maintenance Organizations which shall pay the annual license fee provided for in Section 2504 of Title 63 of the Oklahoma Statutes; and
>
> (2) An annual tax on all of said direct written premiums after all returned premiums are deducted, and on all membership, application, policy and/or registration fees collected thereby,

for the privileges of having written, continued and/or serviced insurance on lives, property and/or other risks in this state and of having made and serviced investments therein during the then expiring license year except premiums or fees paid by any county, city, town or school district funds or by their duly constituted authorities performing a public service organized pursuant to Section 1001 through 1008 of Title 74 of the Oklahoma Statutes, or Sections 176 through 180.4 of Title 60 of the Oklahoma Statutes.

* * *

For all insurance companies or other entities taxed pursuant to this section, the annual license fee and tax and all required membership, application, policy, registration, and agent appointment fees shall be in lieu of all other state taxes or fees, except those taxes and fees provided for in the Insurance Code and in Sections 2501 through 2510 of Title 63 of the Oklahoma Statutes, and the taxes and fees of any subdivision or municipality of the state, except ad valorem taxes and the tax required to be paid pursuant to Section 50001 of Title 68 of the Oklahoma Statutes.

* * *

Protestant argues that the public policy expressed in the insurance code is that insurance companies are subject to payment of only those taxes enumerated in Section 624. In this regard, Protestant believes that the Oklahoma Sales Tax Code can be harmonized with that public policy through the language of Section 1351 of the Sales Tax Code which states, "[t]his code shall be construed as

imposing a tax upon the sale of tangible personal property and services, not otherwise exempted, to the consumer." 68 O.S. § 1351. Protestant maintains that "not otherwise exempted" should not be construed as limited to the exemptions provided in the Sales Tax Code. This claim, however, cannot be reconciled with the levying provision of the Sales Tax Code.

The effective date of the Sales Tax Code was some 20 odd years after the enactment of Section 624 of the Insurance Code. Consequently, an argument that at the time of enactment of Section 624 the legislature intended the "in lieu" provision to apply to sales tax, is faulty. The assertion that the insurance companies are exempt from sales tax as purchasers must find support in some other rationale.

The language of the levying provision of the Sales Tax Code expressly states that the sales are taxable unless otherwise exempted in the Sales Tax Code. Section 1354 of Title 68 states:

> Tax Levy – Rate – Sales subject to tax
>
> 1. There is hereby levied upon all sales, not *otherwise exempted in the Oklahoma Sales Tax Code,* an excise tax of . . . of the gross receipts or gross proceeds of each sale of the following:
>
> * * *

[Emphasis added].

Although there are numerous provisions in the Sales Tax Code specifying sales which are exempt from tax, absent from those provisions is any reference to sales made to

insurance companies which pay the license fee and premiums tax. The relevant exemption statute under which an exemption for insurance companies would be found is 68 O.S. Supp. 1989, § 1355. Section 1355 reads as follows:

§ 1355. Exemptions – Subject to other tax.

Exemptions – Subject to other tax.

There are hereby exempted from the tax levied pursuant to the provisions of this article:

(A) Sale of gasoline or motor fuel on which the Motor Fuel Tax, Gasoline Excise Tax, or Special Fuels Tax levied in Article 5, 6, or 7 of this title has been, or will be paid;

(B) Sale of motor vehicles or any optional equipment or accessories attached to motor vehicles on which the Oklahoma Motor Vehicle Excise Tax levied in Article 21 of this title has been, or will be paid;

(C) Sale of crude petroleum or natural or casinghead gas and other products subject to gross production tax pursuant to the provisions of Articles 10 and 11 of this title. This exemption shall not apply when such products are sold to a consumer or user for consumption or use, except when used for injection into the earth for the purpose of promoting or facilitating the production of oil or gas. This subsection shall not operate to increase or repeal the gross production tax levied by the laws of this state;

(D) Sale of aircraft on which the tax levied pursuant to the provisions of Sections 6001 through 6004 of this title has been, or will be paid. Provided that the provisions of this paragraph shall not become operative until July 1, 1984; and

> (E) Sales from coin-operated devices on which the fee imposed by Sections 1501 through 1513 of this title has been paid.

Taking into consideration the express language of the levying provision and the fact that insurance companies which pay the premiums tax are not enumerated among the exemptions of Section 1355, or any other section, further supports a conclusion that the companies are not exempt from sales tax on their purchases.

II.

The Attorney General of Oklahoma responded to an inquiry of a State Representative in 1988 regarding the very issue that this protest involves. The Attorney General was presented with the following question: Are fees and taxes imposed upon insurance companies by 36 O.S. Supp. 1988, § 624, in lieu of all state, county, or municipal sales taxes, wherein an insurance company is acting as a purchaser of goods or services and a sales tax would otherwise be imposed? The Attorney General issued his opinion concluding that the "in lieu of" language of Section 624 of Title 36 could not be construed to exempt insurance companies from payment of state and local sales tax where the insurance company is acting as the purchaser of goods and services and a sales tax would otherwise be imposed. Op.Atty.Gen.No. 88-34 (August 26, 1988). Because of adherence to the following tenants [sic], the Oklahoma Tax Commission must follow the opinion of the Attorney General.

The rule that is applied to the duty of state agencies with regard to opinions of the Oklahoma Attorney General is cited by the Division's counsel, and it must be accepted by this agency. The Oklahoma Supreme Court stated in *Aetna Casualty & Surety v. State Board for Property & Casualty Rates*, 637 P.2d 1251, 1254 (Okl. 1981):

> [U]nder the law in Oklahoma when doubt exists concerning the construction of a statute, it is the duty of public officers to follow the advice of the Attorney General. *Rasure v. Sparks*, 75 Okl. 181, 183 P.495 (1919). The final construction of a statute rests with the Courts and the opinion of the Attorney General is not controlling, although it is given great respect. *State ex rel. Clifton v. Reeser*, Okl. 543 P.2d 1379 (1975). In other words, it is the duty of public officers to follow Attorney General's opinions until relieved of such duty by a court of competent jurisdiction. *Pan American Petroleum Corp. v. Board of Tax-Roll Corrections of Tulsa County*, Okl. 510 P.2d 680 (1973).

This case falls squarely within this rule absent a narrowly articulated exception enunciated by the Court in *State ex rel. York v. Turpen*, 681 P.2d 763 (Okl. 1984), which held in relevant part:

> [A]n opinion of the Attorney General stating an act of the legislature is unconstitutional should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this State.

In conclusion, the Oklahoma Tax Commission is bound by the Opinion of the Attorney General construing

the Oklahoma Insurance Code, which the Attorney General opined does not provide an exemption from payment of Oklahoma sales and use tax for purposes of state and local tax liability. Accordingly, the claim for refund of Claimant must be denied.

CONCLUSIONS OF LAW

1. The in lieu language of Section 624 of the Oklahoma Insurance Code does not act as an exemption from the payment of sales taxes for insurance companies subject to Section 624 when the company has purchased goods and services. 36 O.S. § 624.

2. The Sales Tax Code imposes an excise tax on the sale of goods and services, unless otherwise exempted in the Sales Tax Code. 68 O.S. § 1354. No exemption is provided in the Sales Tax Code for sales made to insurance companies, which pay a license fee and premiums tax under 36 O.S. § 624.

3. It is the duty of the Oklahoma Tax Commission to follow the advice of the Attorney General rendered in Op.Atty.Gen.No. 88-34 (August 26, 1988).

4. The protest should be denied.

RECOMMENDATION

It is the recommendation of the undersigned Administrative Law Judge, based upon the specific facts and circumstances of this case, that the sales and use tax claim for refund of Globe Life and Accident Insurance Company be denied.

OKLAHOMA TAX COMMISSION

/s/ Melanie K. Parks
MELANIE K. PARKS
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the above and foregoing Findings, Conclusions and Recommendations of the Administrative Law Judge were delivered to Joe Mark ElKouri, General Counsel, and to Mark Alan Harter, Assistant General Counsel, Oklahoma Tax Commission, by the undersigned on this 29th day of December, 1989.

/s/ Rosa Flipse

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing Findings, Conclusions and Recommendations of the Administrative Law Judge was mailed, by certified mail, with proper postage prepaid, to Steven K. McKinney, Monnet, Hayes, Bullis, Thompson & Edwards, 1719 First National Center - West, Oklahoma City, Oklahoma 73102, by the undersigned on this 29th day of December, 1989.

/s/ Rosa Flipse

APPENDIX "B"

BEFORE THE OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

IN THE MATTER OF THE CLAIM FOR REFUND OF SALES AND USE TAX BY GLOBE LIFE AND ACCIDENT INSURANCE COMPANY	)))))	CASE NO. CR-89-015

ORDER NO. 90-02-09-009

This comes on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The Commission, having reviewed the facts and authorities presented therein, and being fully advised in the premises, finds and orders that the Application for Oral Argument Before the Tax Commission En Banc is hereby denied and that the Findings, Conclusions and Recommendations of the Administrative Law Judge, filed herein on the 29th day of December, 1989, marked as Exhibit "A", attached hereto and hereby incorporated by reference as though fully set out herein, be and the same are hereby adopted as the Order of the Commission.

DATED this FEB 09 1990.

(SEAL)

ATTEST: OKLAHOMA TAX COMMISSION

/s/ Jo Ellen Corbin
Assistant Secretary

APPROVED AS TO FORM:

JOE MARK ELKOURI
General Counsel

/s/ Mark Alan Harter
Mark Alan Harter
Assistant General Counsel

/s/ Robert E. Anderson
ROBERT E. ANDERSON,
CHAIRMAN

/s/ Robert L. Wadley
ROBERT L. WADLEY,
VICE CHAIRMAN

/s/ Don Kilpatrick
DON KILPATRICK,
SECRETARY-MEMBER

APPENDIX "C"

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

In the Matter of the Claim for Refund of Sales Tax.	)	
PROFESSIONAL INVESTORS LIFE INSURANCE COMPANY,	)	No. 75,178
Appellant,	)	FOR OFFICIAL PUBLICATION
v.	)	
OKLAHOMA TAX COMMISSION,	)	
Appellee.	)	

APPEAL FROM THE OKLAHOMA TAX COMMISSION

(Filed DEC 3 1991)

Insurance company filed for refund of sales tax paid on electricity claiming it was exempt under Okla. Stat. tit. 36, § 624. Commission denied refund. Insurance company appealed.

AFFIRMED

James R. Lieber
Tulsa, Oklahoma — For Appellant

Joe Mark Elkouri
General Counsel — For Appellee

Tony Mastin
Assistant General Counsel
Oklahoma Tax Commission
Oklahoma City, Oklahoma

HODGES, V.C.J.

This is an appeal from an order of the Oklahoma Tax Commission (Commission) for a refund of sales tax. The appellant, Professional Investors Life Insurance Company (Professional), underwrites insurance in Oklahoma. Professional pays an annual tax on premiums generated from the sale of insurance (premium tax) pursuant to Okla. Stat. tit. 36, § 624.[1] Public Service Company of Oklahoma (PSO) has provided electric service to Professional for a number of years. Prior to August 26, 1988, PSO did not bill Professional for any tax on the electricity nor did PSO pay sales tax to the Commission on electric service provided to Professional.

On August 26, 1988, Oklahoma's Attorney General issued an opinion which stated:

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[1] Okla. Stat. tit. 36 § 624 (Supp. 1988) provides:

> For all insurance companies or other entities taxed pursuant to this section, the annual license fee and tax and all required membership, application, policy, registration, and agent appointment fees shall be in lieu of all other state taxes or fees, except those taxes and fees provided for in the Insurance Code and in Sections 501 through 2510 of Title 63 of the Oklahoma Statutes, and the taxes and fees of any subdivision or municipality of the state, except ad valorem taxes and the tax required to be paid pursuant to Section 50001 of Title 68 of the Oklahoma Statutes. . . .

> It is, therefore, the official opinion of the Attorney General that the provisions of 36 O.S.Supp. 1988, § 624 do not exempt an insurance company from the payment of sales tax, where such insurance company is acting as the purchaser of goods or services and a sales tax would otherwise be imposed.[2]

The Commission advised PSO of the attorney general's opinion. In turn, PSO advised Professional that Professional would be billed for sales tax on electric service provided by PSO.

Professional responded that it would delete the sales tax amount from its payment to PSO. Thereafter, PSO billed Professional for sales tax on electric service which Professional refused to pay. Then PSO notified Professional that electric service was scheduled to be cut-off on November 21, 1988, for non-payment of the sales tax amount.

On December 28, 1988, Professional filed suit against PSO and the Commission and obtained a temporary order restraining PSO from cutting off electrical service to Professional. Subsequently, the temporary restraining order was dissolved, and the suit was dismissed without prejudice. PSO requested a credit for sales tax paid to the Commission on behalf of Professional. The Commission denied the request. Then Professional formally requested a refund of sales tax paid on electricity and a determination that Professional was exempt from payment of all sales tax. The Commission denied Professional's refund

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[2] 20 Op. Att'y Gen. 81, 85 (1988) (No. 88-34).

request. Professional demanded a hearing. The administrative law judge denied the refund in her Findings, Conclusions, and Recommendations. The Tax Commission En Banc denied a request for oral hearing and adopted the Findings, Conclusions, and Recommendations of the administrative law judge.

The dispositive issue is whether insurance companies are exempt under section 624 of title 36 from paying sales tax. We agree with the Commission that insurance companies are not exempt. The Commission relies on section 1354 of the Oklahoma Sales Tax Code (Tax Code)[3] as authority for denying the refund. Section 1354 of the Tax Code states, "There is hereby levied upon all sales, *not otherwise exempted in the Oklahoma Sales Tax Code,* an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of . . . electricity. . . . " Sections 1355 through 1359 of the tax code lists numerous exemptions to the sales tax imposed by section 1354. Insurance companies which pay premium tax are not among those exemptions.

Professional does not disagree that section 1354 of the Tax Code imposes a sales tax on the sale of electricity. Rather, Professional relies on section 1351 of the Tax Code which states, "[T]his Code shall be construed as imposing a tax upon the sale of tangible personal property and services, not otherwise exempted, to the consumer." Professional asserts that section 624 of title 36 is clear and provides the exemption provided for in section 1351. Therefore, it is exempted from the sales tax imposed by section 1354.

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[3] Okla. Stat. tit. 68, §§ 1301-1372 (Supp. 1988).

Section 624 provides that "annual license fee and tax . . . shall be in lieu of all other state taxes or fees." Section 624 has its foundation in the Oklahoma Constitution.[4] Article 19, section 2 provides that, unless otherwise provided by law, foreign insurance companies doing business in Oklahoma shall pay "two percentum on all premiums collected in the state" and "three dollars on each local agent." In 1909, the legislature enacted the predecessor to section 624 which imposed an annual premium tax of two per cent on all premiums collected within the state and three dollars on each local agent and provided that the taxes were paid "in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State."[5] The "in lieu of" language has been carried forward to the current version of the statute with only slight modifications.[6]

This court first considered the "in lieu of" language in *New York Life Ins. Co. v. Town of Comanche*.[7] In *Town of*

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[4] OKLA CONST. art. 19, § 1-2.

[5] Comp. Laws of Okla. § 3742 (1909).

[6] Currently Okla. Stat. tit. 36, § 624 (Supp. 1990), provides:

> For all insurance companies or other entities taxed pursuant to this section, the annual license fee and tax and all required membership, application, policy, registration, and agent appointment fees shall be in lieu of all other state taxes or fees. . . .

[7] 62 Okla. 247, 162 P. 466 (Okla. 1916).

Comanche, the town attempted to impose a license fee on an agent of New York Life Insurance Company (New York Life). New York Life had paid the annual state premium tax.[8] We held "that any foreign life insurance company which pays the [premium] taxes contemplated by [the premium tax statute] cannot be subjected to a license tax by any municipality in this state. . . . "[9]

In 1932, this Court once again considered the "in lieu of" language of the premium tax statute in *New York Life Ins. Co. v. Board of County Comm'rs.*[10] In that case, we held that insurance companies who paid the annual premium tax were not exempt from county ad valorem tax. We held that the annual premium tax was not "in lieu of personal ad valorem taxes, but only in lieu of all other licenses or privilege fees or agency taxes. . . . "[11] We found that:

> The words of the statute are not exemptive words, but are limitations on the right of a city or any other municipality or subdivision of the state from levying and collecting any further license, privilege, occupation fee or tax on a

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[8] *New York Life Ins. Co. v. Town of Comanche* was brought under Okla. Rev. Laws § 3426 (1910), which is the predecessor to Okla. Stat. tit. 36, § 624 (Supp. 1990), and successor to Comp. Laws of Okla. § 3742 (1909).

[9] New York Life Ins. Co. v. Town of Comanche, 162 P. at 468.

[10] 155 Okla. 247, 9 P.2d 936 (1932). In 1921, Comp. Laws of Okla. § 3742 (1909), was codified at Comp. Okla. Stat. § 6687 (1921).

[11] New York Life Ins. Co. v. Board of County Comm'rs, 9 P.2d at 943.

foreign insurance company licensed to do business within the state.[12]

In 1945, the Legislature adopted the decision of *Board of County Commissioners* and amended the "in lieu of" provisions to except ad valorem taxes.[13] Thereafter, the legislature enacted other exceptions to the "in lieu of" language.[14]

On August 6, 1988, the Oklahoma Attorney General issued his opinion stating that insurance companies who pay premium taxes pursuant to section 624 are not exempt from the payment of sales tax on purchased goods or services when "a sales tax would otherwise be imposed."[15] This opinion is consistent with this Court's ruling in *Board of County Commissioners.*[16] The Attorney General found that section 624 does not exempt an insurance company from paying sales tax when the "insurance company is acting as the purchaser of goods or services and a sales tax would otherwise be imposed." We agree with the Attorney General's opinion and reaffirm our holding in *Board of County Commissioners* that the annual

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[12] *Id.*

[13] 1945 Okla. Sess. Laws tit. 36, ch. 1, § 1 (codified at Okla. Stat. tit. 36, § 104 (Supp. 1957).

[14] *See* 1986 Okla. Sess. Laws ch 251, § 8; 1987 Okia. Sess. Laws c. 175, § 5; 1988 Okla. Sess. Laws c. 83, § 5.

[15] 20 Op. Att'y Gen. 81, 85 (1988) (No. 88-34).

[16] After the Attorney General rendered the opinion, the Legislature amended section 624 twice. Neither of the last two amendments created a new exception to the "in lieu of" provision or refuted the Attorney General's opinion.

premium tax is "only in lieu of all other licenses or privilege fees or agency taxes."

Because we find that Professional is subject to the sales tax assessed by the Commission, we need not address the remaining arguments. The Commission correctly denied the refund.

AFFIRMED.

OPALA, C.J., HODGES, V.C.J., LAVENDER, SIMMS, DOOLIN, HARGRAVE, WILSON, SUMMERS, JJ., Concur.

KAUGER, J., Concur in Result by reason of stare decisis.

APPENDIX "D"

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

GLOBE LIFE AND ACCIDENT INSURANCE COMPANY, Appellant, v. OKLAHOMA TAX COMMISSION, Appellee.	)	No. 75,160 Companion with No. 75,178 FOR OFFICIAL PUBLICATION

APPEAL FROM THE OKLAHOMA TAX COMMISSION

(Filed MAY 12 1992)

Insurance company filed for refund of sales tax on personal property pursuant to Okla. Stat. tit. 36, § 624. Tax Commission denied refund based on Attorney General's Opinion No. 88-33. Insurance company appealed.

AFFIRMED

Monnet, Hayes, Bullis, Thompson & Edwards
By: Steven K. McKinney
and
John T. Edwards
Oklahoma City, Oklahoma — For Appellant

Joe Mark Elkouri
General Counsel
and — For Appellee

Tony Mastin
Assistant General Counsel
Oklahoma Tax Commission
Oklahoma City, Oklahoma

and

David Hudson
General Counsel
and
Christy J. Caesar
Assistant General Counsel
Oklahoma Tax Commission
Oklahoma City, Oklahoma

For Appellee

HODGES, V.C.J.

This matter is before this Court after an administrative law judge for the Oklahoma Tax Commission (Commission) denied Globe Life and Accident Insurance Company's (Globe) request for a refund of sales tax. The stipulated facts of this case are identical to the facts of *Professional Investors Life Insurance Co. v. Oklahoma Tax Comm'n,* 825 P.2d 1292 (Okla. 1991). This case is controlled by *Professional Investors* and *Branch Trucking Co. v. Oklahoma Tax Comm'n,* 801 P.2d 686 (Okla. 1990).

The stipulated facts are as follows. Globe sells insurance through its agents. Pursuant to Okla. Stat. tit. 36, § 624, Globe pays premium tax on insurance sold in Oklahoma. Before August 26, 1988, Globe did not pay sales tax on purchases of personal property, and vendors did not collect sales tax from Globe on purchases of personal property.

On August 26, 1988, the Attorney General of the State of Oklahoma issued Opinion No. 88-34. The opinion stated:

> It is, therefore, the official opinion of the Attorney General that the provisions of 36 O.S.Supp. 1988, § 624 do not exempt an insurance company from the payment of sales tax, where such insurance company is acting as the purchaser of goods or services and a sales tax would otherwise be imposed.

Before the Attorney General issued the opinion, the Commission did not require vendors to collect sales tax from Globe for the purchase of personal property. Globe has requested a refund of the sales tax which it has paid for the purchase of personal property.

The matter was brought before an administrative law judge who found that Globe was not exempt, pursuant to Okla. Stat. tit. 36, § 624, from the payment of sales tax on the purchase of personal property and denied the refund. Globe appealed. The two issues presented in this appeal are: (1) Whether the premium tax paid by Globe under Okla. Stat. tit. 36, § 624 exempted Globe from the payment of sales tax on the purchase of personal property; and (2) Whether the Oklahoma Tax Commission was bound by the opinion of the Attorney General.

I.

The issue of whether Globe was exempted from sales tax on personal property was decided in *Professional Investors*. In *Professional Investors*, the appellant insurance company complained about paying sales tax on electricity. In that case, this Court agreed with the Attorney General's opinion finding that, pursuant to Okla. Stat. tit. 36, § 624, an insurance company was not exempt from the payment of sales tax "where such insurance company is

acting as the purchaser of goods or services and a sales tax would otherwise be imposed." The refund was denied.

In the present case, Globe was "acting as the purchaser of goods or services" on which a sales tax would generally be imposed. *Professional Investors* controls this issue. The sales tax was appropriately imposed.

II.

This Court decided the issue of whether an agency was bound by the opinion of the Attorney General in *Branch.* In *Branch,* this Court stated: "The Attorney General is the 'chief law officer' of Oklahoma. Since 1919, the Attorney General's opinions have been binding on state officials unless the opinion is inconsistent with a final determination of a court of competent jurisdiction." *Branch Trucking Co.,* 801 P.2d at 690. The second issue in the present case is answered by this statement from *Branch.* Further, because this Court has determined that the tax was appropriate, the issue of the binding effect of the Attorney General's opinion is moot. *See Branch* at 690.

The Commission properly followed the opinion of the Attorney General and denied Globe's refund request. The order of the Commission is affirmed.

AFFIRMED.

Concur: OPALA, C.J., HODGES, V.C.J., LAVENDER, SIMMS, HARGRAVE, WILSON, SUMMERS, JJ.

Concur in Result by reason of stare decisis: KAUGER, J.

APPENDIX "E"

INSURANCE

§ 624. Report of Premiums, fees and taxes – Payment – Penalties

Every insurance company, copartnership, insurance association, interinsurance exchange, person, insurer, nonprofit hospital service and medical indemnity corporation, or health maintenance organization, doing business in the State of Oklahoma in the execution or exchange of contracts of insurance, indemnity or health maintenance services, or as an insurance company of any nature or character whatsoever, hereinafter referred to in this article as an insurance company, or company, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of direct written premiums, membership, application, policy and/or registration fees charged during the preceding calendar year, or since the last return of such direct written premiums, membership, application, policy and/or registration fees was made by such company, from insurance of every kind upon persons or on the lives of persons resident in this state or upon real and personal property located within this state, and/or upon any other risks insured within this state, provided, that with respect to the tax payable annually, considerations received for annuity contracts and payments received by a health maintenance organization from the Secretary of Health and Human Services pursuant to a contract issued under the provisions of 42 U.S.C., Section 1395mm(g) shall no longer be deemed to

be premiums for insurance and shall no longer be subject to the tax imposed by this section. Every such company shall at the same time pay to the insurance Commissioner:

(1) An annual license fee as prescribed by Section 321 of this Code, except for Health Maintenance Organizations which shall pay the annual license fee provided for in Section 2504 of Title 63 of the Oklahoma Statutes; and

(2) An annual tax on all of said direct written premiums after all returned premiums are deducted, and on all membership, application, policy and/or registration fees collected thereby, for the privileges of having written, continued and/or serviced insurance on lives, property and/or other risks in this state and of having made and serviced investments therein during the then expiring license year except premiums or fees paid by any county, city, town or school district funds or by their duly constituted authorities performing a public service organized pursuant to Sections 1001 through 1008 of Title 74 of the Oklahoma Statutes, or Sections 176 through 180.4 of Title 60 of the Oklahoma Statutes. Provided, no deduction shall be made from premiums for dividends paid to policyholders. The rate of taxation for calendar year 1988 shall be three percent (3%). For all subsequent calendar years, the rate of taxation for all entities subject to said tax shall be two and twenty-five one-hundredths percent (2.25%). No tax shall be levied upon any assessment or policy fee collected during calendar years 1990 and 1991 in response to the requirements of the Insurance Commissioner pursuant to subsection A or subsection B of Section 1509 of this title provided, such funds are used for

the sole purpose of paying losses and associated expenses. If any insurance company or other entity uses such funds for any purpose other than payment of losses and associated expenses, such entity shall be liable for the taxes levied pursuant to the provisions of this section which would have been otherwise levied and collected, including interest thereon at a rate equal to the annual average interest rate earned on state funds by the State Treasurer during such tax period.

For all insurance companies or other entities taxed pursuant to this section, the annual license fee and tax and all required membership, application, policy, registration, and agent appointment fees shall be in lieu of all other state taxes or fees, except those taxes and fees provided for in the Insurance Code[1] and in Sections 2501 through 2510 of Title 63 of the Oklahoma Statutes, and the taxes and fees of any subdivision or municipality of the state, except ad valorem taxes and the tax required to be paid pursuant to Section 50001 of Title 68 of the Oklahoma Statutes. Any company, except health maintenance organizations, failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes and fees, the sum of Five Hundred Dollars ($500.00); and the company so failing or neglecting for sixty (60) days shall thereafter by debarred from transacting any business of insurance in this state until said taxes, fees and penalties are fully paid, and the Insurance Commissioner shall revoke the license or certificate of authority granted to the agent or agents of that company to

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[1] Section 101 et seq. of this title.

transact business in this state. Provided, that when any such insurance company, copartnership, insurance association, interinsurance exchange, person, insurer, or nonprofit hospital service and indemnity corporation, applies for the first time for a license to do business in Oklahoma, it shall, at the time of making such application, pay a license fee as prescribed by Section 1425 of Article 14A of this Code, and, on or before the last day of February, following, pay the premium tax, membership, application, policy, registration, and agent appointment fees, as herein-before provided. Such license fees, tax and membership, application, policy registration, and appointment fees shall be in lieu of all other state taxes or fees except those taxes and fees provided for in the Insurance Code; and the taxes and fees of any subdivision or municipality of the state, except ad valorem taxes and the tax required to be paid pursuant to Section 50001 of Title 68 of the Oklahoma Statutes.

Any health maintenance organization failing to file premium tax returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of Five Hundred Dollars ($500.00). Any health maintenance organization failing or neglecting to pay said tax and penalty shall be debarred from operating in this state and the State Department of Health shall revoke the license of the health maintenance organization, until said taxes and penalties are fully paid.

Amended by Laws 1990, c. 227 § 1, emerg. eff. May 18, 1990.

APPENDIX "F"

(SEAL)

ROBERT H. HENRY
ATTORNEY GENERAL
STATE OF OKLAHOMA

August 26, 1988

The Honorable Ernest Istook
State Representative
State Capitol
Room 505
Oklahoma City, OK 73105

OPINION NO. 88-34

Dear Representative Istook:

The Attorney General has received your request for an official opinion asking in effect:

1. Are fees and taxes imposed upon insurance companies by 36 O.S. Supp. 1988, § 624, in lieu of all state, county, or municipal sales tax, where an insurance company is acting as a purchaser of goods or services and a sales tax would otherwise be imposed?

2. May the Oklahoma Tax Commission impose any duty upon the vender to account for sales, or to collect or forward any funds, when otherwise taxable goods are purchased by a purchaser who qualifies under the above-cited statute?

The specific statute about which you inquire, 36 O.S. Supp. 1988, § 624, has gone through many amendments and recodifications since it was first enacted by the Legislature in 1909. Its genesis is found in Article XIX, § 2, of

the Oklahoma Constitution, which in most pertinent part provides:

> *Until otherwise provided by law,* domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent.

(Emphasis added.)

As originally enacted in 1909 the statute provided in pertinent part as follows:

> Each and every foreign insurance company doing business in this state . . . [shall pay] . . . an annual tax of two per centum on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to such Insurance Commission, *which taxes shall be in lieu of all other taxes, or fees, and the taxes and fees of any subdivision or municipality of the state.*

(Emphasis added.)

Despite the language emphasized in the statute above, the Oklahoma Supreme Court in the case of *New York Life Ins. Co. v. Board of County Com'rs of Oklahoma County,* 9 P.2d 936 (Okla. 1932), readily held that such language did not exempt the foreign insurance companies from paying county ad valorem property taxes. The Court cited and quoted language from other authorities to the effect that a tax on gross premiums of insurance is an excise tax, in the nature of a license tax, occupation tax, privilege tax, or

business tax, but in any event not a property tax. It further found that the "in lieu" or exemption language in the statute was intended to apply only to taxes or fees of a like kind as the gross premiums tax, inasmuch as the law does not favor exemptions from taxes. In accord and cited in the Oklahoma opinion are *Queen City Fire Ins. Co. v. Basford,* 130 N.W. 44 (S. Dak. 1911), and *Millers' Mut. Fire Ins. Co. v. City of Austin,* 210 S.W. 825 (Tex. C.A., 1919).

Whether simply to adopt and codify the *New York Life* decision or for other reasons, the Legislature in 1945 added the words "except ad valorem taxes" to the "in lieu" or exemption language. *See* Laws 1945, p. 123, § 1. Other exceptions to the "in lieu" or exemption language were added in 1986, 1987 and 1988. the pertinent language of § 624 now provides that various specified fees and taxes:

> shall be in lieu of all other state taxes and fees, *except those taxes and fees provided for in the Insurance Code* [added by Laws 1987, c. 175, § 8] *and in Sections 2501 through 2510 of Title 63 of the Oklahoma Statutes* [added by Laws 1988, c. 83, § 5], and the taxes and fees of any subdivision or municipality of the state, except ad valorem taxes *and the tax required to be paid pursuant to Section 50001 of Title 68 of the Oklahoma Statutes* [added by Laws 1986, c. 251, § 8].

It is to be noted that none of the exceptions written into the "in lieu" or exemption language of § 624 relates to anything resembling a sales tax.

It is further to be noted that Oklahoma first enacted sales tax legislation many years after the "in lieu" or exemption language of § 624 was part of the law. *See* Laws 1935, p. 308, §§ 1 *et seq.*

It is still further to be noted that the present language of our basic authorizing sales tax statute, 68 O.S. Supp. 1988, § 1354, says:

> There is hereby levied upon all sales, *not otherwise exempted in the Oklahoma Sales Tax Code,* an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale [.]

(Emphasis added.)

In the seminal case of *Connecticut Light & Power Co. v. Walsh,* 57 A.2d 128 (Conn. 1948), the Supreme Court of Errors of Connecticut held that an "in lieu" exemption provision in a statute that predated the state's sales tax act could not have been intended to apply to the sales tax. The opinion says:

> The broad statement that the tax upon the gross earnings of telephone companies shall be "in lieu of all other taxation" upon them is not necessarily to be given a literal meaning. "In construing the act it is our duty to seek the real intent of the legislature, even though by so doing we may limit the literal meaning of the broad language used". [Citation omitted.] It is not reasonable to assume that the General Assembly intended by the provisions we have quoted that the tax on gross earnings should take the place of taxes of a kind not then anywhere imposed and entirely outside its knowledge. When this provision is read in the light of its history and evident purpose, we are satisfied

> that it did not mean that telephone companies should not in the future be subjected to any other tax no matter what might be its nature. [Citations omitted.]

57 A.2d at 133.

In a case which cited and relied upon the *Connecticut* case, *Farm and Home Savings Ass'n v. Spradling*, 538 S.W.2d 313 (Mo. 1976), the Missouri Supreme Court said:

> The instant case involves exemption provisions of a statute (148.520) other than the statute imposing the tax (144.610). In 68 Am. Jur. 2d, Sales and Use Taxes, sec. 101, p. 149, it is stated: "Whether exemption from imposition of a sales tax may be claimed by virtue of exemption provisions of statutes or ordinances other than those imposing the sales tax (usually earlier statutes) involves an application to this sphere of inquiry of general rules and principles governing interpretation of tax exemptions. Applying such principles, the few cases in which the precise question has been considered are in accord as to the result reached, and, though differing slightly in the reasons given as the basis for their conclusions, have uniformly held that sales taxes were not within the exemption provisions of other statutes imposing a different tax." This statement is borne out in the cases annotated at 1 A.L.R.2d 465, "Sale or Use Tax Exemptions", and subsequent cases.

538 S.W.2d at 317.

Among cases citing and relying at least in part on the *Connecticut* opinion-to conclude that there was no intent to exclude from sales tax provisions under similar although not identical "in lieu" statutes are: *Celina Mutual*

Ins. Co. v. Bowers, 213 N.E.2d 175 (Ohio 1965), and *Security Life and Accident Co. v. Heckers*, 495 P.2d 225 (Colo. 1972). The only case contra we have found is *Santa Fe Downs, Inc. v. Bureau of Revenue*, 509 P.2d 882 (N.M. 1973), where the "in lieu" statute specifically exempted from all excise taxes. The authorities are in agreement that a sales tax is an excise tax (*see*, e.g., *Flynn, Welch & Yates v. State Tax Commission*, 28 P.2d 889 (N.W. 1934), cited in *Santa Fe Downs, supra*), and the state sales tax is declared to be an excise tax in our basic sales tax statute: 68 O.S. Supp. 1988, § 1354.

In light of the foregoing we conclude that the "in lieu" or exemption language of § 624 is not intended to exempt insurance companies from the *state* sales tax, where they are purchasing goods or services otherwise subject to sales tax. (The fact that § 624 has been amended since its original enactment to apply to domestic as well as foreign insurance companies does not affect our conclusion.)

The statute, 68 O.S. Supp. 1988, § 1370.1, which authorizes counties of more than 300,000 population to levy a sales tax does not mention any exemptions. The companion and earlier statute, 68 O.S. Supp. 1988, § 1370, which authorizes all other counties to levy a sales tax, however, states that: "All items that are exempt from the state sales tax shall be exempted from any sales tax levied by a county." We do not find that this language or any other language found in the statutes relating to county sales taxes affects the reasoning and analysis we applied above and we conclude that the "in lieu" or exemption language of § 624 is not intended to exempt insurance companies from any *county* sales tax.

The statute, 68 O.S. Supp. 1988, § 2701, which authorizes incorporated cities and towns to levy and collect a sales tax (as well as other taxes) says in pertinent part:

> Any incorporated city or town in this state is hereby authorized to assess, levy, and collect taxes for general and special purposes of municipal government as the legislature may levy and collect for purposes of state government except ad valorem, property taxes. . . . Provided, however, that this act shall not be construed to authorize imposition of any tax upon persons, firms, or corporations exempted from other taxation under the provisions of Title 36 O.S. 1961, *Sections* 348.1, *624* and 321, as amended, by reason of payment of taxes imposed under said sections.

(Emphasis added.)

We interpret the language in the quoted proviso in this statute, particularly that referring to § 624, simply to mean that the legislature did not intend for the broad powers to tax granted to municipalities to include the further taxing of the gross premiums of insurance companies already paying the "in lieu" tax of § 624 to the state. It is a universal rule that tax exemption statutes are to be narrowly construed against exemption (*see* e.g., *McDonald's Corp. v. Oklahoma Tax Commission*, 563 P.2d 641 (Okla. 1977)), and we therefore conclude that neither § 624 nor § 2701, *supra*, exempts insurance companies, when acting as purchaser, from *municipal* sales tax. We have found no other pertinent provisions of law that would do so.

Having concluded that the insurance companies subject to § 624 are not qualified as exempt purchasers for state, county or municipal sales tax purposes, we do not find it necessary to answer your second question as asked. For your general guidance, however, we cite the U.S. Supreme Court case of *Pierce Oil Corp. v. Hopkins,* 265 U.S. 137, 44 S.Ct. 251, 68 L.Ed. 593, (1924) wherein the "incidental burden" of collecting, reporting, etc., taxes laid on a seller even though the taxes are paid by a purchaser, was upheld against a constitutional challenge.

It is therefore, the official opinion of the Attorney General that the provisions of 36 O.S. Supp. 1988, § 624, do not exempt an insurance company from the payment of sales tax, where such insurance company is acting as the purchaser of goods or services and a sales tax would otherwise be imposed.

/s/ Robert H. Henry
ROBERT H. HENRY
ATTORNEY GENERAL OF
OKLAHOMA

/s/ Hugh H. Collum
HUGH H. COLLUM
ASSISTANT ATTORNEY
GENERAL

(SEAL)

APPENDIX "G"

§ 1351. Intent

It is hereby declared that the intent of the Legislature is that this Code shall be construed as amending, revising and renumbering the present statutes relating to sales tax in respect to matters herein. It is further hereby declared that the intent of the Legislature is that the excise tax levy re-enacted herein and all other provisions of this Code shall be construed as imposing a tax upon the sale of tangible personal property and services, not otherwise exempted, to the consumer.

Laws 1981, c. 313, § 2, emerg. eff. June 29, 1981.

APPENDIX "H"

CONSTITUTION OF THE UNITED STATES Amend. 14, § 1

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "I"

(SEAL)

OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

2501 LINCOLN BLVD.
OKLAHOMA CITY, OKLAHOMA 73194

November 7, 1988

BUSINESS TAX
DIVISION
405/521-4316

GLOBE LIFE & ACCIDENT INSURANCE
COMPANY OF OKLA, INC.
14000 QUAIL SPRINGS PARKWAY
OKLAHOMA CITY OK 73134

Dear Sir/Madam:

This is to advise you that on August 26, 1988, the Attorney General of Oklahoma issued Opinion 88-34 in the matter of the sales tax exemption status of purchases of tangible personal property made by insurance companies. The Attorney General states:

> "It is therefore, the official opinion of the Attorney General that the provisions of 36 O.S. Supp. 1988, § 624, do not exempt an insurance company from the payment of sales tax, where such insurance company is acting as the purchaser of goods or services and a sales tax would otherwise be imposed."

Effective August 26, 1988, an insurance company, either foreign or domestic, purchasing goods or services does *not* have an exemption from the payment of state, city or county sales tax.

If you have any questions concerning this matter or if I can be of further assistance, please feel free to contact me.

Sincerely,

BUSINESS TAX DIVISION

/s/ Randy Ross

Randy Ross
Director

RR:wr

APPENDIX "J"

LEGISLATIVE CHANGES AND OTHER NOTICES

NOTICE: HEARING FOR THE NEWLY DRAFTED SALES TAX RULES AND REGULATIONS

WHEN: November 30, 1988 9:30 a.m.

WHERE: First Floor Hearing Room
M.C. Connors Building
2501 Lincoln Blvd.
Oklahoma City, OK

This hearing is open to the public.

NOTICE: ATTORNEY GENERAL OPINION NO. 88-34

Effective August 26, 1988, an insurance company acting as a purchaser of goods or services does NOT have an exemption from the payment of State, City or County Sales Tax.

NOTICE: LEGISLATIVE CHANGES

House Bill 1804 established a sales tax/motor fuel exemption card. These cards will be issued to all qualified farmers. Effective July 1, 1989 you will be required to put this card number on all invoices along with the statement verifying farm exemption.

92-223

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GLOBE LIFE AND ACCIDENT INSURANCE COMPANY,

Petitioner,

v.

**STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,**

Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of Oklahoma**

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a full hearing before the Oklahoma Tax Commission on Petitioner's claim for refund and full review of the Commission Order denying said claim by the Oklahoma Supreme Court satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REASONS WHY PETITION SHOULD BE DENIED 1

I. PETITIONER HAS FAILED TO SET FORTH A COMPELLING REASON WHICH MERITS SUPREME COURT REVIEW 1

II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS YIELDING THE DECISION INAPPROPRIATE FOR SUPREME COURT REVIEW 2

III. PETITIONER WAS AFFORDED PROCEDURAL DUE PROCESS BEFORE THE OKLAHOMA TAX COMMISSION AND ON APPEAL TO THE OKLAHOMA SUPREME COURT 4

CONCLUSION 5

APPENDIX A A-1

TABLE OF AUTHORITIES

Cases: Page

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1127,
14 L.Ed.2d 62 (1965) 4

Branch Trucking v. Oklahoma Tax Commission,
801 P.2d 686 (Okla.1990) 2, 3

Cities Service Gas Co. v. Oklahoma Tax Commission,
656 F.2d 584 (10th Cir. 1981),
cert. denied, 454 U.S. 1124 (1981) 4, 5

Globe Life and Accident Insurance Co. v. Oklahoma Tax Commission,
831 P.2d 649 (Okla. 1992) 2, 3

Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459,
89 L.Ed. 789 (1945) 2

McKesson v. Division of Alcoholic Beverages and Tobacco,
____ U.S. ____, 110 S.Ct. 2238,
110 L.Ed.2d 17 (1990) 5

New York Life Ins. Co. v. Board of County Commissioners,
155 Okla. 247, 9 P.2d 936 (1932) 3

*Professional Investors Life Insurance Company v. Oklahoma
Tax Commission*,
825 P.2d 1292 (Okla. 1991) 2, 3

Page

Statutes:

28 U.S.C., § 1257(a) 1

Okla. Stat. tit. 36, § 624 (Supp. 1988) 3

Oklahoma Uniform Tax Procedure Code,
Okla. Stat. tit. 68 (1981):

§ 201 4

§ 225 ..... 4, 5, A-1

§ 227 ..... 4, A-2

§ 228 ..... 4, 5, A-3

Other Authorities:

20 Op. Okla. Att'y Gen. 81 (1988) ..... *passim*

Rule 10, *Rules of the Supreme Court* 1

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BRIEF FOR RESPONDENT

REASONS WHY PETITION SHOULD BE DENIED

I. PETITIONER HAS FAILED TO SET FORTH A COMPELLING REASON WHICH MERITS SUPREME COURT REVIEW.

Although Petitioner cites Section 1257(a) of Title 28 of the United States Code in its jurisdictional statement as granting jurisdiction to this Court, Petitioner fails to recite any of the grounds enumerated therein. Without making specific reference in its petition to Rule 10 of the *Rules of the Supreme Court*, Petitioner states as the reason for review that the Oklahoma Supreme Court has decided a federal question in a way that conflicts with the decisions of this Court. In support thereof, Petitioner alleges that its due process rights were denied at the

administrative level when the Oklahoma Tax Commission treated Attorney General's Opinion No. 88-34 as dispositive of the issue of the sales taxability of insurance companies. Petitioner further alleges that its due process rights were denied when the Oklahoma Supreme Court failed to address whether this treatment by the Oklahoma Tax Commission was violative of its constitutional rights. Although Petitioner has alleged the denial of due process as stated above, Petitioner fails to cite any authority of this Court supportive of these allegations.

Petitioner misstates the holding of the Oklahoma Supreme Court on the binding effect of an opinion of the Oklahoma Attorney General on the actions of the Oklahoma Tax Commission. In *Globe Life and Accident Insurance Co. v. Oklahoma Tax Commission*, 831 P.2d 649, 650 (Okla. 1992), the Oklahoma Supreme Court, citing its holding in *Branch Trucking v. Oklahoma Tax Commission*, 801 P.2d 686 (Okla. 1990), stated that "[a]n Attorney General's Opinion is binding on state officials *until a court of competent jurisdiction renders an inconsistent decision*." (emphasis added). Under this holding, the Oklahoma Supreme Court had the opportunity and authority to render invalid Attorney General's Opinion No. 88-34. However, the Oklahoma Supreme Court, in considering the taxability issue instead agreed with the opinion of the Attorney General thereby effectuating plenary review.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS YIELDING THE DECISION INAPPROPRIATE FOR SUPREME COURT REVIEW.

The general rule regarding Supreme Court review of state court decisions is that review is inappropriate where the state court decision rests on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

In the case at bar, the Oklahoma Supreme Court decided that insurance companies are not exempt under Oklahoma law from paying sales tax when acting as a purchaser of goods and services. This holding was based solely upon state law. Thus, the decision rested on adequate and independent state grounds. In its opinion, the Oklahoma Supreme Court stated that the instant case was controlled by *Branch Trucking* and *Professional Investors Life Insurance Co. v. Oklahoma Tax Commission*, 825 P.2d 1292 (Okla. 1991), the companion case of *Globe*.

In *Professional Investors*, the court held that the purchase of electricity by an insurance company was subject to sales tax pursuant to Section 1354 of the Oklahoma Sales Tax Code. *Professional Investors* at 1293. The court also examined the exemptions enumerated in the Oklahoma Sales Tax Code and found that none of the exemptions were applicable to the transactions at issue. Id. at 1295.

The court further found that the "in lieu of" tax provision of the Oklahoma Insurance Code did not relieve insurance companies from the imposition of sales tax on their purchases of goods and services. Okla. Stat. tit. 36, § 624 (Supp. 1988) provides as follows:

> For all insurance companies or other entities taxed pursuant to this section, the annual license fee and tax and all required membership, application, policy, registration, and agent appointment fees shall be in lieu of all other state taxes or fees, ...

The court found that the payment of fees and taxes imposed by the aforementioned section of law is not in lieu of sales tax where an insurance company is acting as a purchaser of goods or services and a sales tax would otherwise be imposed. The court based this finding on its agreement with the rationale of Attorney General's Opinion No. 88-34 and its prior holding in *New York Life Ins. Co. v. Board of County Commissioners*, 155 Okla. 247, 257, 9 P.2d 936, 943 (1932), that the annual premium tax is "only in lieu of all other licenses or privilege fees or agency taxes."

The Oklahoma Supreme Court, in the *Globe* opinion, found that the Oklahoma Tax Commission properly followed the opinion of the Attorney General, citing *Branch Trucking*. *Globe* at 651. In *Branch Trucking*, the Oklahoma Supreme Court stated:

> The Attorney General is the 'chief law officer' of Oklahoma. Since 1919, the Attorney General's opinions have been binding on state officials unless the opinion is inconsistent with a final determination of a court of competent jurisdiction.

Branch Trucking at 690.

However, in *Globe*, the Oklahoma Supreme Court also held that the Petitioner was appropriately required to pay sales tax on its purchases. *Globe* at 650. Because the Oklahoma Supreme Court found the tax to be appropriate, the issue of the binding effect of the Attorney General's opinion is moot.

The opinion of the Oklahoma Supreme Court in the case at bar was supported by adequate and independent state grounds since the decision was based on state law and other Oklahoma Supreme Court cases. Therefore, the decision of the Oklahoma Supreme Court is inappropriate for Supreme Court review.

III. PETITIONER WAS AFFORDED PROCEDURAL DUE PROCESS BEFORE THE OKLAHOMA TAX COMMISSION AND ON APPEAL TO THE OKLAHOMA SUPREME COURT.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Petitioner was afforded and exercised an opportunity to challenge the imposition of the tax before the Administrative Law Judge of the Oklahoma Tax Commission and on review before the Oklahoma Supreme Court.

Oklahoma's Uniform Tax Procedure Code (the "Code"), Okla. Stat. tit. 68, § 201 *et seq.*, (1981) establishes the remedies and procedures for challenging the State's tax laws and their enforcement. The Code specifically empowers the Oklahoma Tax Commission to hear and determine tax controversies. The relevant Oklahoma tax procedure statutes, Okla. Stat. tit. 68, §§ 225, 227 and 228 (1981) are set forth in Appendix A to this brief.

The Code gives a taxpayer who has made a claim for refund the right to a full oral hearing before the Oklahoma Tax Commission in which all arguments and authority may be presented. Okla. Stat. tit. 68, § 227 (1981). Moreover, the Code gives an aggrieved taxpayer the right to appeal from a final order of the Oklahoma Tax Commission directly to the Oklahoma Supreme Court. Okla. Stat. tit. 68, § 225 (1981).

The adequacy of the administrative process afforded by the Code was considered by the Tenth Circuit in the case of *Cities Service Gas Co. v. Oklahoma Tax Commission*, 656 F.2d 584 (10th Cir. 1981) *cert. denied*, 454 U.S. 1124 (1981). In *Cities Service*, plaintiff brought action in the United States District Court contesting the constitutionality of a state tax statute. The United States District Court dismissed the action for lack of subject matter jurisdiction stating as its reason that plaintiff had a plain, speedy and efficient remedy in the state courts. Id. at 586. Plaintiff appealed the dismissal to the Tenth Circuit alleging that a full and fair hearing may not be available in the Oklahoma state

court due to a prior Oklahoma Supreme Court decision which upheld the constitutionality of the tax in question. In affirming the dismissal, the Tenth Circuit concluded that Oklahoma's statutory remedies for challenging the state's tax laws "meet the requirements set out by this Court that the state procedural remedy provide the opportunity for a 'full hearing and judicial determination' of the Plaintiff's claim." Id. at 587.

To satisfy the requirements of due process in cases involving a postdeprivation refund action, a state must provide taxpayer with not only a fair opportunity to challenge the validity of the tax obligation but also a clear and certain remedy designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property. *McKesson v. Division of Alcoholic Beverages and Tobacco*, ____ U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). The Oklahoma statutory scheme provided Petitioner with a clear and certain remedy. In the event Petitioner had prevailed before the Oklahoma Tax Commission, or on appeal to the Oklahoma Supreme Court, Petitioner would have received a full refund of sales tax paid pursuant to Section 228 or 225, respectively.

The state procedural remedy of which Petitioner availed itself provided an opportunity for a full hearing and judicial determination of Petitioner's claim. Moreover, had Petitioner prevailed upon administrative or judicial review, the sales tax paid under protest would have been fully refunded affording Petitioner a clear and certain remedy. In accordance with the authorities cited above, further review by this Court is not warranted.

CONCLUSION

The decision of the Oklahoma Supreme Court is inappropriate for review by this Court. The Oklahoma decision was supported by, and in conformity with, state law and prior Oklahoma Supreme Court cases. Thus, the decision rested on adequate and independent state grounds.

The requirements of due process were fully satisfied under the Oklahoma statutory scheme of review. Petitioner was provided a fair opportunity to challenge the validity of the tax and availed itself of that opportunity. Had Petitioner prevailed, the sales tax paid under protest would have been fully refunded, providing Petitioner with a clear and certain remedy.

Since the opinion of the Oklahoma Supreme Court was based solely on state grounds, and the statutory scheme of review provided full opportunity for

hearing and a clear and certain remedy, no compelling reason exists to merit Supreme Court review.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Oklahoma Uniform Tax Procedure Code,
Okla. Stat. tit. 68 (1981):

§ 225. Appeals.

(a) Any taxpayer aggrieved by any order, ruling, or finding of the Tax Commission directly affecting such taxpayer may appeal therefrom directly to the Supreme Court of Oklahoma. A taxpayer so desiring to appeal shall, within ten (10) days from the date of mailing to the taxpayer of any such order, ruling, or finding, file with the Tax Commission a written notice of his intention to appeal.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling, or finding complained of, the taxpayer desiring to appeal shall file in the office of the Clerk of the Supreme Court a petition in error specifying the grounds upon which such appeal is based. At the same time the taxpayer shall request that the Tax Commission prepare for filing with the Supreme Court, within thirty (30) days, the record of the appeal, certified to by the Secretary of the Tax Commission, and consisting of any citations, findings, judgments, motions, orders, pleadings and rulings, together with a transcript of all evidence introduced at any hearing relative thereto, or such portion of such citations, findings, judgments, motions, orders, pleadings, rulings, and evidence as the appealing parties and the Tax Commission may agree to be sufficient to present fully to the Court the questions involved. Upon request of the taxpayer, the Tax Commission shall furnish him a copy of the proceedings had in connection with the matter complained of.

(c) As a condition precedent to the right of the taxpayer to prosecute such an appeal, and as a jurisdictional prerequisite of the Supreme Court to entertain such appeal, it is specifically provided that, if the appeal be from an order, judgment, finding, or ruling of the Tax Commission assessing a tax or an additional tax, penalties, and interest, the taxpayer shall pay to the Tax Commission the amounts assessed. If, upon a final determination of the appeal the order assessing such tax, penalties, and interest is reversed or modified and it is determined that said tax or part thereof was erroneously or illegally assessed, said amounts so paid by the taxpayer, together with the interest thereon at the rate of three percent (3%) per annum, shall be refunded to the taxpayer by the Tax Commission.

(d) Such refunds and interest thereon shall be paid by the Tax Commission out of monies in the Tax Commission clearing account from subsequent collections from the same source as the original tax assessment, provided that in the event there are insufficient funds for refunds from subsequent collections from the same source, the refund shall be paid by the Tax Commission from monies appropriated by the Legislature to the special refund reserve account for such purposes as hereinafter provided. There is hereby created within the official depository of the State Treasury an agency special account for the Tax Commission for the purpose of making such refunds as may be required under this section, not otherwise provided. This account shall consist of monies appropriated by the Legislature for the purpose of making refunds under this section.

(e) In lieu of the cash payment provided for in the preceding paragraph, the taxpayer may file with the Tax Commission a bond in double the amount of the tax, additional tax, penalties and interest so assessed, conditioned that he will faithfully and diligently prosecute such appeal to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, will pay such tax, additional tax, penalties and interest, and costs so assessed against him.

(f) If the appeal be from an order, judgment, finding or ruling of the Tax Commission other than one assessing a tax and from which a right of appeal is not otherwise specifically provided for in this article, any aggrieved taxpayer may appeal from any such order, judgment, finding or ruling as provided in this section and may supersede the effect of such order, judgment, ruling or finding by filing with the Tax Commission a bond in an amount fixed by the Tax Commission payable to the State of Oklahoma conditioned that such appeal will faithfully and diligently be prosecuted to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, that such person will immediately conform thereto.

(g) This section shall be construed to provide to the taxpayer a legal remedy by action at law in any case where a tax, or the method of collection or enforcement thereof, or any order, ruling, finding or judgment of the Tax Commission is complained of, or is sought to be enjoined in any action in any court of this state or the United States of America.

§ 227. Erroneous payments — Claims for refund.

(a) Any taxpayer who has paid to the State of Oklahoma, through

error of fact, or computation, or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest.

(b) Any taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof if such payment was made through error of fact or computation, or within one (1) year from the date of payment thereof if such payment was made through misinterpretation of law, file with the Tax Commission a verified claim for refund of such tax so erroneously paid.

Said claim so filed with the Tax Commission shall specify the name of the taxpayer, the time when and period for which said tax was paid, the nature and kind of tax so paid, the amount of the tax which said taxpayer claimed was erroneously paid, the grounds upon which a refund is sought, and such other information or data relative to such payment as may be necessary to an adjustment thereof by the Tax Commission. It shall be the duty of the Commission to determine what amount of refund, if any, is due as soon as practicable after such claim has been filed and advise the taxpayer about the correctness of his claim. Provided, the provisions of this section shall not apply: (1) to refunds of income tax erroneously paid, refunds of which tax shall be payable out of the income tax adjustment fund as provided by law; (2) to estate tax because the payment of such tax is covered by an order of the Tax Commission and the estate and interested parties are given notice that Commission's position and computation of the tax will become final unless they protest and resist the payment thereof as provided by statute; nor, (3) in any case where the tax was paid after an assessment thereof was made by the Tax Commission which assessment became final under the law.

§ 228. Hearings on claims for refunds.

(a) Upon the demand of the taxpayer, the Oklahoma Tax Commission shall set the claim for refund authorized in the preceding section down for hearing within sixty (60) days after the filing thereof, of which time of hearing the taxpayer shall be duly notified.

If, upon such hearing, the Tax Commission finds that such tax was erroneously paid through mistake of fact, or computation or misinterpretation of law, it shall enter its written order allowing said claim for refund, which refund may be paid to the taxpayer as provided by law, or credited against any taxes due or to become due by the taxpayer as the case may be; otherwise, the Tax Commission shall deny said claim. The taxpayer shall have the right of appeal

to the Supreme Court from a decision of the Commission denying said claim for refund as provided in Section 225 of this article.

(b) Any order entered by the Tax Commission, disallowing a claim for refund, shall become final within thirty-one (31) days from the date it is entered, unless an appeal is prosecuted therefrom, in which event said order shall not become final until the appeal shall have been determined. In the event the Tax Commission allows said claim for refund, it shall pay the claimant the amount of refund, so allowed out of funds in the official depository clearing account of the Tax Commission, derived from collections in said fund from the same source from which the overpayment occurred; and an appropriation of so much of said fund as is necessary to pay said claims for refund erroneously paid or collected is hereby made; provided, that in the case of refunds due hereunder to taxpayers who are required to remit taxes to the Tax Commission on a monthly or quarterly basis, the Commission may, in lieu of a refund of the tax erroneously paid, credit the account of the taxpayer for such amount.